

SHORT TITLE: Corporations; creating Fair Franchise Practices Act;
codification; effective date.

STATE OF OKLAHOMA

1st Session of the 44th Legislature (1993)

SENATE BILL NO. 510

By: Henry

AS INTRODUCED

An Act relating to franchising; providing short title; creating the Fair Franchise Practices Act; defining terms; providing application; requiring duty to act in good faith; specifying franchisor's duty of competence; prohibiting disclaimer of certain duties; allowing negotiation of terms of franchise; authorizing purchases from independent sources and providing exceptions; prohibiting termination or nonrenewal without good cause; allowing transfer of transferable interest; providing exceptions; requiring notice of proposed transfer; prohibiting unreasonable withholding of consent; providing exceptions; providing conditions of transfer, with exception; allowing franchisor right of first refusal; providing exception; prohibiting withholding of consent to a franchisee making public offering; prohibiting franchisor to withhold consent to a pooling of interests by franchisees; allowing assignment of interest for unexpired term of franchise; providing for noninterference by franchisor in certain circumstances; providing for security interests of franchisee; prohibiting franchisor from enforcing certain covenants and providing exception; providing for transfers by franchisor; prohibiting franchisor from restricting franchisee's right to engage in certain businesses after expiration,

termination or transfer of franchise and providing exception; providing for enforcement of certain franchise provisions; allowing freedom of association of franchisees; requiring collective bargaining by franchisor with more than thirty-five franchisees; prohibiting encroachment on territory of franchisee and providing exception; placing burden of proof of certain facts on franchisor; prohibiting discrimination; providing private right of action; allowing recovery of certain costs; providing for injunctive relief; requiring procedural fairness; prohibiting waiver or avoidance of act; prohibiting certain choice of law provisions; prohibiting noncompliance with act; prohibiting stipulations depriving opportunity to prove or contest a fact; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2100 of Title 18, unless there is created a duplication in numbering, reads as follows:

This act shall be known and may be cited as the "Fair Franchise Practices Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2101 of Title 18, unless there is created a duplication in numbering, reads as follows:

As used in this act:

1. "Affiliate" means a person who controls, is controlled by, or is under common control with, a franchisor;

2. "Franchise" means a contract or agreement between two or more persons by which:

- a. a franchisee is granted the right to engage in a franchised business,
- b. operation of the franchised business is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or the franchisor's affiliate, and
- c. the franchisee pays or is required to pay, directly or indirectly, a franchise fee;

3. "Franchise fee" means a fee or charge for the right to enter into or maintain a franchise, including any payment for goods or services;

4. "Franchise fee" shall not include:

- a. a payment at a bona fide wholesale price for a reasonable quantity of inventory,
- b. a payment of a reasonable service charge to the issuer of a credit or debit card by a person accepting or honoring such card, or
- c. a payment at fair market value for a reasonable quantity of real estate, fixtures, equipment, or other tangible property to be used in, and necessary for, the operation of the franchisee's business;

5. "Franchise business" means a business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor;

6. "Franchisee" means a person to whom a franchise is granted;

7. "Franchisor" means a person who grants a franchise;

8. "Franchisor-notice security agreement" means a security agreement that creates an obligation on the part of a secured party that is enforceable by a franchisor to give the franchisor:

- a. notice of the secured party's intent to foreclose on collateral described in the security agreement at the same time as the secured party gives such notice to the franchisee concerned or, if the secured party is the franchisee concerned, at a reasonable time, and
- b. a reasonable opportunity to redeem the interest of the secured party and to recover the secured party's interest in the franchise or franchised business concerned by paying the secured obligations (or the fair market value of secured obligations not stated as amount payable in cash);

9. "Good cause" means:

- a. a complete withdrawal by a franchisor from the conduct of business in this state, or
- b. a failure by a party to a franchise who has received a written notice from another such party that describes corrective action that must be taken, and the time period within which such action must be taken to prevent termination of the franchise, to correct a default of a provision of the franchise:
 - (1) within thirty (30) days of receipt of the notice, if the notice specifies a default of a material provision of the franchise, or
 - (2) within forty-eight (48) hours of receipt of the notice, if the notice specifies a default of a material provision of the franchise that constitutes a clear and present danger to public health or safety;

10. "Good faith" means honesty in fact and the observance of reasonable standards of fair dealing in the trade;

11. "Outlet" means a place of business from which a person offers products or services for sale to another person;

12. "Trade secret" means information known to a franchisor or its affiliate, including a formula, pattern, compilation, program, device, method, technique or process that:

- a. derives actual or potential independent economic value from not being readily ascertainable through proper means by another person who can obtain economic value from its disclosure or use, and
- b. is the subject of efforts to maintain its secrecy that are reasonable under the circumstances;

13. "Transfer" refers to a change in ownership or control, but does not include any of the events in which a franchisor is prohibited from interfering by Section ___ of this act; and

14. "Transferable interest" means:

- a. an interest in a franchise or a franchisor that is not an individual,
- b. a franchisee's or a franchisor's interest in a franchised business, or
- c. a franchisee's or a franchisor's interest in a franchise.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2102 of Title 18, unless there is created a duplication in numbering, reads as follows:

This act shall apply to:

1. A franchise or an interest in a franchise that is entered into, renewed, transferred, assigned, amended, or replaced on or after the date of the enactment of this act;

2. A franchise of indefinite duration that is in existence on the date of the enactment of this act; and

3. A franchisee, franchisor, franchised business, or other person subject to a franchise described in paragraph 1 or 2 of this section.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2103 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. A franchise shall include an implied duty on the part of a party to the franchise to act in good faith in the performance and the enforcement of the rights and duties established in the franchise.

B. The duty described in subsection A of this section shall include an obligation on the part of a party to a franchise, in making a decision or in exercising a power that directly affects the franchise or the franchised business concerned, to give due and equal regard to an interest of any other such party that is likely to be affected by the decision made or the power exercised.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2104 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. In a franchisor's undertaking with a franchisee, the franchisor shall exercise the skill and knowledge normally possessed by franchisors in good standing in similar communities or trade areas, unless the franchisor:

1. Represents that it has greater skill or knowledge; or
2. Conspicuously disclaims that it has the normal skill or knowledge.

B. The duty described in subsection A of this section may not be disclaimed or qualified by agreement or by conduct, but a franchisor may by written agreement define specifically the nature and scope of its skill or knowledge and of its undertaking with a franchisee.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2105 of Title 18, unless there is created a duplication in numbering, reads as follows:

A franchisor that has delivered to a prospective franchisee a valid offering circular may negotiate with the prospective franchisee concerning the terms of a franchise and may execute with the prospective franchisee a franchise which reflects terms negotiated from the initial offering.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2106 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. A franchisee may obtain equipment, fixtures, supplies and services used in the establishment and operation of a franchised business from any source, if the goods and services meet any reasonable standard regarding their nature and quality that may be promulgated by the franchisor concerned.

B. Subsection A of this section shall not apply to a reasonable quantity of inventory goods or services, including display and sample items, that:

1. A franchisor requires a franchisee to obtain from the franchisor or its affiliate;
 2. Are a central feature of the franchised business concerned;
- and
3. Are manufactured or produced solely for the account of the franchisor or its affiliate and incorporate a trade secret of the franchisor or its affiliate.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2107 of Title 18, unless there is created a duplication in numbering, reads as follows:

A franchisor may not terminate or refuse to renew a franchise the term of which is indeterminate without good cause.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2108 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. A franchisee may transfer a transferable interest to a transferee who meets a franchisor's reasonable, essential, and nondiscriminatory standards for new franchisees or transferees, as the standards are in effect on the date the franchisee and the transferee agree to the transfer. A franchisor may not withhold its consent to such a transfer without good cause.

B. A franchisee shall give a franchisor not less than thirty (30) days' written notice of a proposed transfer of a transferable interest, and on request shall advise the franchisor in writing of the ownership interests of all persons holding or claiming an equitable or beneficial interest in the franchise, the franchised business, or the franchisee.

C. A franchisor may not unreasonably withhold its consent to a proposed transfer of a transferable interest. A transfer is deemed approved thirty (30) days after a franchisee submits the proposed transaction for consent, unless the franchisor earlier disapproves the transaction by written notice specifying each basis for the disapproval or exercises a right of first refusal. Such a notice is privileged against a claim of defamation.

D. A franchisor may condition its consent to a proposed transfer by a franchisee of a transferable interest on:

1. The transferee's successful completion of a reasonable, essential, and nondiscriminatory training program;

2. The payment of a transfer fee to the franchisor to reimburse it for its reasonable, actual, out-of-pocket expenses directly related to the transfer; or

3. The payment of any amount the franchisee owes the franchisor or its affiliate.

E. A franchisor may not condition its consent to a transfer described in subsection D of this section on a franchisee:

1. Undertaking new or different obligations than those contained in the franchise concerned;

2. Foregoing existing rights other than those contained in the franchise concerned; or

3. Entering into a release of claims broader in scope than a counterpart release of claims offered by the franchisor to the franchisee.

F. A franchisor may exercise a right of first refusal in connection with a proposed transfer by a franchisee of a transferable interest, if such right is reserved in the franchise. A franchisor may not exercise such right more than thirty (30) days after the date it receives a franchisee's request for consent to the proposed transfer. A franchisor may not exercise such right if doing so would result in it holding a minority ownership interest in the franchised business or the franchisee concerned. A franchisor may determine whether to exercise such right based only on the merits and circumstances of the proposed transfer.

G. A franchisor may not withhold its consent to a franchisee making a public offering of its securities without good cause, if the franchisee or the owner of the franchisee's interest in the franchise retains control over more than fifty percent (50%) of the voting power in the franchisee.

H. A franchisor may not withhold its consent to a pooling of interests or an exchange of assets by its existing franchisees.

I. A franchisee may assign its interest in a franchise for the unexpired term of the franchise. A franchisor may not require the franchisee or the assignee to enter into a new or different franchise as a result of the assignment.

J. A franchisor may not interfere with:

1. The succession to ownership or management of a franchisee or a franchised business upon the death or disability of a franchisee, or of an owner, officer, or director of a franchisee, by a spouse, child, fellow shareholder or partner of the deceased or disabled franchisee, owner, officer, or director;

2. Incorporation of a proprietorship franchisee or franchised business;

3. Transfers within an existing ownership group of a franchisee or franchised business of less than a controlling interest in the franchisee or franchised business;

4. Transfers of less than a controlling interest in a franchisee or franchised business to the franchisee's or its owners' spouse or child;

5. Transfers of less than a controlling interest in a franchisee or a franchised business to an employee stock ownership or employee incentive compensation or deferred benefit plan;

6. A grant or retention of a security interest in a franchise, a security or ownership interest in a franchised business or its assets, or a security or ownership interest in a franchisee, if the agreement that governs the grant or retention is a franchisor-notice security agreement; or

7. The use of management consultant or hiring of a professional manager by a franchisee or a franchised business.

K. A franchisor may not prevent a franchisee that transfers a transferable interest from retaining or foreclosing a security interest in any asset transferred, including a franchise if:

1. The security interest is created to secure obligations of the transferee to the franchisee; and

2. The security agreement that governs the security interest is a franchisor-notice security agreement.

L. 1. After the transfer of a transferor's complete interest in a franchise, a franchisor may not enforce against the transferor

any covenant of the franchise purporting to prohibit the transferor from engaging in any lawful occupation or enterprise.

2. This subsection shall not limit the right of a franchisor to enforce contractual covenants of a transferor not to exploit the franchisor's trade secrets or intellectual property rights, including protection of trade dress, except by agreement with the franchisor.

M. A franchisor, or its owner, may not transfer a transferable interest unless it takes reasonable steps to ensure that the transferee, the franchisor, or the owner will perform the franchisor's obligations under the franchise concerned. A franchisor, or its owner, shall give a franchisee notice of such a proposed transfer at the time the notice is required to be given by the franchisor, or its owner, under applicable securities laws, if the franchisor or its owner is publicly traded. If the franchisor or its owner is not publicly traded, then the notice shall be given at the time the notice would be required if the franchisor or its owner were publicly traded.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2109 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. A franchisor may not prohibit, or enforce a prohibition against, a franchisee engaging in any lawful business at any location:

1. After expiration of the term of the franchise concerned;
2. After termination of the franchise by the franchisee for good cause; or
3. After a transfer by the franchisee of its full interest in the franchise.

B. Subsection A of this section shall not apply if ten (10) or more days before the effective date of an expiration, termination, or transfer described in such subsection, a franchisor offers in

writing to purchase the franchised business concerned for its fair market value as a going concern. Such offer may be conditioned upon the ascertainment of the fair market value by an impartial appraiser.

C. This section shall not prohibit a franchisor from enforcing provisions of a franchise obligating a franchisee after expiration or termination of the franchise:

1. To alter the appearance of the premises to avoid likelihood of confusion as to the affiliation of the business with its former franchisor or the origin of goods or services it offers; or

2. To cease and refrain from using a trade secret of the franchisor or of its affiliate.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2110 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. A franchisor may not directly or indirectly inhibit its franchisees from forming an association or from associating with other franchisees for any lawful purpose. A franchisor may not directly or indirectly penalize a franchisee for organizing or participating in an association of franchisees.

B. A franchisor that has more than thirty-five franchisees in this state shall bargain in good faith with an organization of its franchisees which:

1. Represents generally, or on a specific issue or set of issues, a majority of its franchisees in this state; and

2. Requests such bargaining.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2111 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. A franchisor may not place, or license another to place, a new outlet in unreasonable proximity to an established franchised outlet, if:

1. The intent or probable effect of establishing the new outlet is to cause a reduction of gross sales by the established outlet of more than ten percent (10%) in the twelve (12) months immediately following establishment of the new outlet; and

2. The established outlet offers goods or services identified by the same trademark as those offered from the new outlet, or has premises that are identified by the same trademark as the new outlet.

B. This section shall not apply if, before a new outlet described in subsection A of this section opens for business, a franchisor offers in writing to each franchisee an amount equal to ten percent (10%) of the gross sales, net of sales taxes, returns, and allowances, of the new outlet for the first twenty-four (24) months of the new outlet's operation, if the sales of the established outlet decline by more than ten percent (10%) in twelve (12) months immediately following establishment of the new outlet as a consequence of opening the outlet.

C. A franchisor shall have the burden of proof to show that, or the extent to which, a decline in sales of an established franchised outlet described in subsection A of this section occurred for reasons other than the opening of the new outlet concerned:

1. If the franchisor makes a written offer under subsection B of this section; or

2. In an action or proceeding brought under Section 14 of this act.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2112 of Title 18, unless there is created a duplication in numbering, reads as follows:

In granting franchises, considering approval of transfers of transferable interests, and in administering its franchise system, a franchisor shall not discriminate against any person on the basis of race, color, religion, national origin, sex or physical handicap.

SECTION 14. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2113 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. A party to a franchise who is injured or likely to be injured by a violation or impending violation of this act or of any federal or state act relating to disclosure requirements or acts referring to franchising or business opportunity ventures may bring an action for rescission, damages, injunctive relief or other appropriate relief in a court of competent jurisdiction.

B. The prevailing party in an action brought under subsection A of this section may recover its costs, including its reasonable attorneys' fees.

C. For purposes of determining whether to issue an injunction or a restraining order, a court may presume irreparable harm from a violation of this act or of any act referred to in this section and a court of this state may award preliminary injunctive relief without bond or other financial security in an action brought under subsection A of this section.

SECTION 15. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2114 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. This act shall apply to a franchised business that is operated in whole or in part in this state, to a franchise that grants the right to engage in such a franchised business, and to the parties to such a franchise.

B. This act may not be waived, and its application may not be avoided in whole or in part, by agreement or by conduct, except as part of a settlement of a bona fide dispute.

C. A franchisee may not be deprived of the application and benefits of this act by a provision of a franchise purporting to designate the law of a state other than this state as governing the

franchise or the interpretation of the franchise, or to designate a venue outside of this state for the resolution of disputes.

D. A person's obligation to comply with this act may not be excused or avoided, and evidence of a violation of this act may not be excluded from evidence, because of a provision of a franchise, the parol evidence rule, or any other rule of law purporting to prohibit a factfinder from considering matters other than the text of a franchise.

E. A liquidated damages provision, a confession of judgment provision, or any other provision in a franchise pursuant to which a party to the franchise is or would be deprived of an opportunity to prove or contest a fact that is relevant to this act shall be unenforceable.

SECTION 16. This act shall become effective September 1, 1993.

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